Supreme Court, U.S.
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No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING, INC.,
A Michigan corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

A District Court has original jurisdiction over civil actions pursuant to, *inter alia,* 28 U.S.C. §§ 1441 and 1331 (2004). This Court has long held that a District Court has subject matter jurisdiction over a case if the plaintiff's complaint establishes that the plaintiff's right to relief under a state law requires resolution of a substantial question of federal law in dispute between the parties.

In this case, Petitioner affirmatively and necessarily alleged in its Complaint that Petitioner's interest in certain property had not been effectively extinguished or effectively conveyed to Respondent because notice of the property's seizure by a federal agency was not served on Petitioner by that federal agency in a manner that adequately conformed with the federal requirements established in 26 U.S.C. § 6331 *et seq.* (2004).

The question presented is when Petitioner brings a state procedural cause of action requiring a determination of whether federal law requires a federal agency to strictly comply with certain federal notice requirements in order to effectively seize and convey Petitioner's property, or whether such seizure and conveyance is effective upon substantial compliance with the federal notice requirements, does Respondent have the right to remove such a cause of action to District Court?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Darue Engineering & Manufacturing, Inc. states as follows:

1. All interested parties to this proceeding are identified in the caption.

2. There is no parent or publicly held company owning 10% or more of the stock of Darue Engineering & Manufacturing, Inc.

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ADDITIONAL STATUTORY PROVISIONS AT ISSUE

In addition to the statutory provisions noted by the Petitioner, the following constitutional provisions and federal statutes, the text of which is set out in the Appendix hereto, are involved also involved this matter: U.S. CONST. art. VI, cl. 2; U.S. CONST. amend. V; 26 U.S.C. § 6331 *et seq.*; and 26 U.S.C. § 7433.

STATEMENT OF THE CASE

A. Factual History

Prior to 1994, Petitioner, Grable & Sons Metal Products, Inc., failed to pay its corporate taxes to the Internal Revenue Service ("IRS") for at least six years.[1] As a result, the IRS recorded tax liens against certain property owned by Petitioner (the "Property"). The IRS then attempted to personally serve Petitioner a notice of seizure on the Property ("Notice of Seizure") because of the tax deficiency. Unable to personally serve Petitioner, the IRS sent the

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[1] The Petitioner's reluctance to meet its federal tax obligations has resulted in repeated unsuccessful encounters with the federal government in the federal courts. United States District Court Judge Gordon A. Quist held several hearings to determine whether the IRS could enter and seize property owned by Petitioner, including the real property at issue in this matter. Judge Quist ultimately determined that the United States could. In an effort to defeat Judge Quist's order, Petitioner filed a bankruptcy action in the United States Bankruptcy Court for the Western District of Michigan. That matter was dismissed as a bad faith filing by Judge James D. Gregg. The property was seized and sold in 1995. Thereafter, Petitioner filed three different actions relating to the government's seizure of Petitioner's property for unpaid taxes, each decided adversely to Petitioner by the District Court and each affirmed on appeal by the Sixth Circuit. *See Internal Revenue Service v. Grable & Sons Metal Products, Inc.*, No. 94-2426, 81 F.3d 160 (Table), 1996 WL 140352 (6th Cir. Mar. 27, 1996); *Grable & Sons Metal Products v. Twitchell*, No. 94-2461, 69 F.3d 537 (Table), 1995 WL 631566 (6th Cir. Oct. 26, 1995); *Grable & Sons Metal Products v. U.S.*, No. 94-1989, 59 F.3d 170 (Table), 1995 WL 367099 (6th Cir. Jun. 19, 1995).

Notice of Seizure by certified mail. Petitioner received the mailed Notice of Seizure and, thus, had actual knowledge that the IRS was seizing its Property. Thereafter, the IRS personally served Petitioner a Notice of the Sale of its Property ("Notice of Sale"), advertised the sale in the local newspaper, and posted the Notice of Sale at a local post office, courthouse, and IRS office. Petitioner brought no legal action challenging or seeking to enjoin the sale.[2]

On November 22, 1994, the IRS sold the Property in a tax sale to Respondent, Darue Engineering and Manufacturing, Inc. Although Petitioner could have redeemed the Property, it did not do so.[3] After the redemption period had lapsed, the IRS issued a deed to Respondent granting all Petitioner's rights, title and interest in the Property to Respondent as provided in Section 6339(b) of the Internal Revenue Code ("Code").[4] Next, the IRS filed

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[2] These facts were all admitted at the Rule 16 Scheduling Conference. Petitioner's counsel – consistent with prior admissions by his client – admitted that Petitioner had actually and timely received the mailed Notice of Seizure. The Tax Division Attorney, representing the IRS, admitted that the Notice of Seizure was not personally served. Petitioner incorrectly asserts in its Brief (pp. 8-9) that it was agreed that the IRS *made no effort* to personally serve the Notice of Seizure or to otherwise comply with 26 U.S.C. § 6335(a). To the contrary, at the Rule 16 Conference the Tax Division Attorney stated that an agent unsuccessfully attempted to personally serve Petitioner, and only thereafter caused notice to be sent by certified mail. There is also considerable testimony in a prior hearing before Judge Quist on the United States Marshal's attempts to serve Petitioner with an order for entry to seize assets. In any case, in light of the admissions by Petitioner of actual notice and by the IRS of the absence of personal service, the Court suggested – and the parties agreed – that the only material issue remaining in dispute was the legal standard of compliance under the federal law with respect to the notice provisions in order for the effective seizure of the Property and its effective conveyance to Respondent. The parties accordingly agreed to brief and argue those legal merits for a final decision by the Court.

[3] *See* 26 U.S.C. § 6337 (2004).

[4] 26 U.S.C. § 6339(b) (2004).

suit against Petitioner for the tax debt that remained unpaid after the sale of the Property. Although the Code affords taxpayers a cause of action against the IRS when, as Petitioner claims,[5] an IRS agent "recklessly or intentionally, or by reason of negligence" disregards any provision of the Code "in connection with any collection of federal tax,"[6] Petitioner did not pursue such a claim, either separately or as a counter-claim against the IRS. Instead, as before, Petitioner did nothing. Consequently, the District Court entered a default judgment in favor of the IRS and against Petitioner reducing the tax liabilities to judgment.

B. Procedural History

1. The Complaint

On December 14, 2000, Petitioner filed a complaint in the Circuit Court for the County of Eaton, State of Michigan. Styled as an action to quiet title, Petitioner alleged that it was "the owner in fee of certain property" and that "there is a cloud on title to said property based on a deed to Defendant Darue Eng. & Mfg, Inc."[7] The complaint further alleged that Respondent's claimed interest in the Property "is invalid because the interest from which it claims, to-wit the Deed . . . was given with improper notice pursuant to 26 U.S.C. § 6331, *et seq*."[8] Petitioner concluded

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[5] Petitioner's Brief On The Merits, p. i and 18-19.

[6] *See* 26 U.S.C. § 7433(a) (2004). The Internal Revenue Code, codified under Title 26, is carefully subdivided. Collection procedures are codified in Subtitle F (Procedure and Administration), Chapter 64 ("Collection") which includes within it Subchapter D ("Seizure of Property for Collection of Taxes"), encompassing Sections 6330 through 6344. Part I is entitled "Due Process for Collections," and Part II (being 26 U.S.C. § 6331 *et seq.*, referenced by Petitioner as the basis for relief in its Complaint) is entitled "Levy."

[7] Complaint to Quiet Title, filed in Circuit County for the County of Eaton, State of Michigan dated December 14, 2000; Brief in Opposition to Petition for Writ of Certiorari, App. 2, ¶¶ 4 and 6.

[8] *Id.* at ¶ 10.

"[t]hat since the tax deed was given pursuant to improper notice as required by 26 U.S.C. § 6335(a), said transfer and claim through the tax deed is null and void and void *ab initio*."[9] Petitioner requested that "Defendant be ordered to have no right, title or interest whatever in [illegible] to the above described premises or any part thereof and that Defendant be enjoined from interfering with the use of the property by Plaintiff, its heirs, and assigns."[10]

2. Proceedings In The District Court

On January 15, 2001, Respondent filed a Notice of Removal to the United States District Court for the Western District of Michigan.[11] On January 30, 2001, Petitioner filed a Motion to Remand, asserting that the Court lacked "original jurisdiction over the subject matter of the case."[12] Petitioner argued that its "Complaint sought to remove the cloud on Plaintiff's title based on a void deed the Defendant obtained from the District Director of the Internal Revenue Service,"[13] and once again anchored its argument upon the application, interpretation, and construction of various provisions of the Code.[14] On April 2, 2001, the United States District Court for the Western District of Michigan, Judge McKeague presiding, heard argument and denied Petitioner's Motion.[15]

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[9] *Id.* at ¶ 11.

[10] *Id.* at the Prayer for Relief.

[11] Notice of Removal of Action Under 28 U.S.C. § 1441(b) (Federal Question) dated January 15, 2001, ¶ 3; 6th Cir. Jt. App. Rec. No. 1.

[12] Plaintiff's Motion to Remand the Case and for Fees and Costs dated January 30, 2001; 6th Cir. Jt. App. Rec. No. 4.

[13] Plaintiff's Memorandum in Support of Motion to Remand the Case and for Fees and Costs dated January 30, 2001, p. 1; 6th Cir. Jt. App., Rec. No. 4.

[14] *Id.* at pp. 6-20.

[15] The District Court focused on whether the right to be vindicated by Petitioner's complaint "necessarily turns on some construction of federal law." Transcript of District Court Hearing on Petitioner's Motion

On April 13, 2001, Respondent interpleaded the United States into the case because the critical issue in determining the case pertained to the actions of the IRS.[16] Thereafter the parties agreed to brief and argue the merits of the case.[17] On March 28, 2002, the District Court entered a Judgment Order in favor of Respondent.[18]

3. Proceedings In The Court of Appeals

Petitioner appealed the District Court's Judgment Order to the Court of Appeals for the Sixth Circuit. That

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to Remand on April 2, 2001; Brief in Opposition to Petition for Writ of Certiorari, App. 1, p. 3. The Court recognized "that when you look at your complaint, particularly paragraphs 10 and 11, it appears as if the entire basis of the claim by [Petitioner] that [Respondent]'s deed is void is that the IRS . . . took title to this property . . . and then conveyed it in a tax sale to [Respondent], . . . [but] failed to strictly comply with the notice requirements of federal law." *Id.* at 4. The Court thus concluded that resolution of Petitioner's claim necessarily turned on "the proper construction of federal law." After rejecting Petitioner's analysis of this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), the Court determined that the federal interests in the case were substantial because the construction of the pertinent provisions of the Code implicated the federal government's title and the ability of tax sale purchasers to rely on the title purchased.

[16] Third-Party Complaint by Defendant Darue Eng. & Mfg., Inc. against 3rd-Party Defendant United States dated April 13, 2001; 6th Cir. Jt. App. Rec. No. 12. As noted earlier, the underlying right which Petitioner's action seeks to vindicate is its right to notice prior to seizure of its property, and Congress has afforded taxpayers such as Petitioner with multiple opportunities – including a claim for damages against the IRS – to protect and vindicate that right. At bottom, although Petitioner brought this action against Respondent as the successor in interest to the IRS, this action turns upon (a) the factual question of whether a federal agency violated a federal statute and (b) the legal issue of whether federal law requires strict or substantial compliance before conferring unassailable title upon a bona fide purchaser for value. Both matters prompted Respondent's joinder of the IRS as a party.

[17] *Supra*, Note 2.

[18] District Court Judgment Order dated March 28, 2002; 6th Cir. Jt. App. Rec. No. 34.

Court considered whether the District Court (and, thus, the Court of Appeals) had proper subject matter jurisdiction.[19] Like the District Court below, the Court of Appeals noted that Petitioner's Complaint had expressly invoked federal law by alleging "that [Respondent]'s quitclaim deed was invalid because it 'was given with improper notice pursuant to 26 U.S.C. § 6331 *et seq.* . . .'"[20] The Court also found the federal interest in the question presented to be substantial:

> The federal government cannot function without effective tax collection. . . . Society has a strong interest in clear rules for handling delinquent taxpayers. The IRS must have transparent procedures for seizing and selling property so that people will be willing to purchase property at tax sales, allowing the IRS to provide a predictable stream of tax revenue. Determining the scope of the IRS's authority to seize property to satisfy a tax debt undoubtedly implicates a substantial federal interest.[21]

The Court of Appeals concluded that Petitioner's complaint necessarily required resolution of a substantial federal question as part of its chosen state-law form of action,[22] upheld the District Court on the merits, and affirmed its Judgment Order. Petitioner then petitioned this Court for a Writ of Certiorari, which was granted "limited to Question 1 presented by the petition."[23]

[19] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 377 F.3d 592, 594-96 (6th Cir. 2004).

[20] *Id.*

[21] *Id.* at 596 (citing *United States v. Kimbell Foods*, 440 U.S. 715, 734 (1979) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819))).

[22] *Id.*

SUMMARY OF ARGUMENT

Pursuant to 28 U.S.C. §§ 1331 and 1441, the District Courts have original jurisdiction and, consequently, removal jurisdiction, over all cases "arising under" the Constitution, laws, or treaties of the United States.[24] This Court has developed a two-step analytical process for determining the existence of federal-question jurisdiction: (1) application of the well-pleaded complaint rule; and (2) application of a dual "arising under" analysis.

The well-pleaded complaint rule asks whether the plaintiff's complaint, as *well-* or *properly*-pleaded, necessarily presents, as an essential element of the claim, a question of federal law.[25] Petitioner here expressly and necessarily invoked provisions of federal law (the Code) in its complaint.[26] Under the Michigan law chosen by Petitioner as the procedural vehicle for its claim and this Court's decision in *Hopkins v. Walker*,[27] Petitioner was *required* to plead and establish in its favor the federal issues and questions found on the face of Petitioner's *well*-pleaded complaint. The federal question was, thus, part of the well-pleaded complaint.

The dual "arising under" jurisdictional analysis – harmonizing Justice Holmes' rule from *American Well*

[23] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, __ U.S. __, 125 S. Ct. 824 (2005).

[24] *See* 26 U.S.C. §§ 1331 and 1441 (2004).

[25] *See Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908); and *Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936).

[26] 26 U.S.C. § 6331, *et seq.* (2004).

[27] *See* MICH. COMP. LAWS § 600.2932 (2004); MICH. CT. R. 3.411 (2004); and *Hopkins v. Walker*, 244 U.S. 486 (1917).

Works v. Layne & Bowler Co.[28] with the rule set forth in *Smith v. Kansas City Title & Trust Co.*[29] – was described in *Gully v. First National Bank in Meridian*[30] and more recently synthesized in *Franchise Tax Board v. Construction Laborers Vacation Trust*:[31] Federal-question jurisdiction exists under that analysis if the "well-pleaded complaint establishes either [(1)] that federal law creates the cause of action or [(2)] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[32]

Under the second of these dual jurisdictional avenues, the focus is on whether Petitioner's "right to relief necessarily depends on resolution of a substantial question of federal law."[33] The answer to that question turns on whether "[(1)] it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or [(2)] that . . . the . . . claim is 'really' one of federal law."[34] From *Gully* and subsequent decisions of this Court, a three-part test has been developed to determine whether a case based on a state-law cause of action nevertheless presents a federal question sufficient to justify the exercise of federal jurisdiction. First, the resolution of the federal question must be outcome determinative to the

[28] 241 U.S. 257, 260 (1916) ("a suit arises under the law that creates the cause of action").

[29] 255 U.S. 180, 199 (1921) (holding that federal-question jurisdiction is appropriate if the plaintiff's "right to relief depends upon the construction or application of the Constitution or laws of the United States").

[30] 299 U.S. 109 (1936).

[31] 463 U.S. 1 (1983). *See also Merrell Dow*, *supra*, at 807, n. 2; *Christianson v. Colt Industries Operating Co.*, 486 U.S. 800, 808 (1988); and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

[32] *Franchise Tax Board*, *supra*, at 27-28.

[33] *Id.*

[34] *Id.* at 13.

case. Second, the federal question must actually be in dispute between the parties. Third, the federal question must implicate a substantial federal interest.

Petitioner's claim satisfies each of these three criteria: (1) It presents a federal question that will determine, the outcome of the case. If the IRS was required to strictly comply with the notice provisions of 26 U.S.C. § 6335 in order to effectively seize Petitioner's property interest and convey good title to Respondent, Petitioner will prevail; but if "substantial compliance" by the IRS was sufficient to confer on Respondent the interest previously held by Petitioner (per 26 U.S.C. § 6339), then Respondent will prevail. (2) This question is in dispute; indeed, it is the only legal dispute between the parties, and is one that appears on the face and at the core of Petitioner's complaint. (3) The federal question to be resolved is "substantial" in that its resolution will necessarily impact the balance Congress has struck in 26 U.S.C. § 6331 *et seq.* between the constitutional interests of notice and due process of the delinquent taxpayer, the interest in enforceable and effective tax collection and revenue generation of the federal government, and the property interest of tax sale buyers. Therefore, the "arising under" jurisdictional analysis of *Smith*, *Gully*, and *Franchise Tax Board* is satisfied and federal jurisdiction is appropriate.

Petitioner, however, mistakenly suggests that this Court's decision in *Merrell Dow* over-ruled and displaced the *Smith/Gully/Franchise Tax Board* jurisdictional analysis by holding that federal-question jurisdiction can only exist if Congress has created a private right of action to enforce or vindicate the federal right at issue. To the contrary, *Merrell Dow* is both in harmony with this line of cases and distinguishable from the instant case. *Merrell Dow* stands for the proposition that in cases (such as that one) where the federal question is at best "collateral" (per *Gully*) to the

plaintiff's state-law claim, the absence of a private right of action provided by Congress to enforce the underlying federal standard is strong (and perhaps conclusive) evidence that the federal question presented is not substantial under a *Smith/Gully/Franchise Tax Board* analysis. *Merrell Dow* does not preclude a finding of federal-question jurisdiction in other *Smith*-type cases where (as here) the federal question provides the substantive source of the plaintiff's claim, even in the absence of a congressionally-created private right of action.

Petitioner's treatment of *Merrell Dow* is at odds with this Court's reaffirmation of the *Smith/Gully/Franchise Tax Board* analysis in two subsequent cases: *Christianson v. Colt Industries Operating Corp.*[35] and *City of Chicago v. Int'l. College of Surgeons.*[36] However, even if *Merrell Dow* is construed as Petitioner claims it should be, the instant case satisfies the jurisdictional test Petitioner would impose. Congress has provided an express cause of action to vindicate taxpayers' notice rights under the Code through an action against the IRS.[37] While Petitioner was not obliged to pursue that remedy, the fact of its existence is evidence of Congress' understanding that the federal interests at issue are substantial. Furthermore, the historic relationship between 28 U.S.C. §§ 1331 and 1340 further evidences Congress' understanding of the substantiality of the federal interests underlying the federal question presented by Petitioner's complaint. In sum, under any reading of *Merrell Dow*, federal-question jurisdiction exists in this case.

LEGAL ARGUMENT

At its core, this case involves the substantial federal question of whether federal law (the Code) requires a federal

[35] 486 U.S. 800 (1988).
[36] 522 U.S. 156 (1997).
[37] 26 U.S.C. § 7433 (2004).

agency (the IRS) to strictly comply with certain federal notice requirements in order to effectively seize and convey Petitioner's property, or whether under federal law such seizure and conveyance is effective upon substantial compliance with the federal notice requirements. A careful and thoughtful review of the complaint and this Court's long-standing interpretation of the congressional grant of jurisdiction to the lower federal courts discloses that this case was appropriately removed to the District Court.

A. Initial Development Of Federal Question Jurisdiction

The current authority of the lower federal courts to hear "federal question" cases was not granted by Congress until the predecessor to modern day 28 U.S.C. § 1331 was enacted in the Act of March 3, 1875.[38] Although the language of the statutory and constitutional grants of jurisdiction are virtually identical, this Court has since recognized that the scope of § 1331 original jurisdiction is not as broad as that of Article III.[39] The Court has tied removal jurisdiction to a determination of whether the federal court would have original jurisdiction.[40]

[38] Chapter 137, § 1, 18 Stat. 470. *See* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720 (1986) ("Except for the short lived Judiciary Act of 1801, Congress did not vest general federal-question jurisdiction in the lower federal courts until 1875.").
[39] U.S. CONST. art. III, § 2, cl. 1. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983), and *Franchise Tax Board, supra*, at 8, n. 8.
[40] *See Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894) (Harlan, J., dissenting) ("the court now holds that . . . to remove . . . [a case] from the state court . . . depend[s] upon the inquiry whether the suit was one in respect of which the original jurisdiction of the circuit court could be invoked by the plaintiff"). *See also City of Chicago, supra.*

While "[t]he jurisdiction structure at issue in this case has remained basically unchanged for the past century,"[41] it has nonetheless spawned a profusion of decisional authority that commentators have occasionally struggled to synthesize and harmonize.

> Since the first version of § 1331 was enacted . . . the statutory phrase "arising under the Constitution, laws, or treaties of the United States" has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts. Especially when considered in light of § 1441's removal jurisdiction, the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.[42]

Petitioner posits that this Court in *Merrell Dow* at last untied this Gordian knot, making the present case susceptible to easy resolution (as well as immediate remand to state court) through the application of a jurisdictional litmus test based upon the presence or absence of a congressionally-created private right of action. Respondent respectfully disagrees and believes, as discussed *infra*, that *Merrell Dow* was simply a further refinement of this Court's definition of the outer limits of federal-question jurisdiction.[43]

[41] *Franchise Tax Board, supra,* at 7.

[42] *Id.* at 8.

[43] As also discussed, *infra*, even applying Petitioner's proposed litmus test, federal-question jurisdiction exists in this matter.

B. The Well-Pleaded Complaint Rule

1. Development Of The Rule

The starting point for every analysis of whether federal-question jurisdiction exists is the plaintiff's complaint. That pleading is to be evaluated, for jurisdictional purposes, under the "well-pleaded complaint" rule – a rule most famously articulated by this Court in *Louisville & Nashville Railroad Co. v. Mottley.*[44] This rule was restated six years later in *Taylor v. Anderson,*[45] and has been treated as the starting point for this Court's analysis of these questions in every case since:

> It has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute . . ., must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.[46]

The general parameters of the rule sound deceptively simple. The focus is solely on Plaintiff's claim.[47] The Court does not look at any defenses asserted (or anticipated to be

[44] 211 U.S. 149, 152 (1908). *See also Franchise Tax Board, supra,* at 9-10.

[45] 234 U.S. 74 (1914).

[46] *Id.* at 75-76. The phrase *"necessarily appears,"* as used by the Court, not only forecloses a plaintiff's unnecessary inclusion of allegations rebutting anticipated federal defenses, but also the inappropriate exclusion of federal issues essential to the cause of action asserted. As discussed later, Petitioner's explicit invocation of the Code was an essential element of its cause of action, not merely a rebuttal of an anticipatory defense.

[47] *See id.*

asserted) by the defendant.[48] However, the Court does not merely look to the complaint as actually drafted by the plaintiff, but rather to that complaint which, in an idealized sense, pleads just enough to have satisfied the rules for pleading the relevant claim – hence, the adjectives "well-pleaded" or "properly-pleaded."[49] "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's *properly pleaded* complaint."[50] Further, although "[t]he rule makes the plaintiff the master of the claim[, and although] he or she may avoid federal

[48] *See* 14B Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3D, § 3722, n. 20 (1998 & Supp. 2004); and *Franchise Tax Board, supra*, at 10.

[49] This subtlety is evidenced by the Court's use of the "artfully pleaded complaint" doctrine as a corollary rule in some cases. The "artfully pleaded complaint" doctrine holds that plaintiff cannot foreclose the defendant's right to remove by artfully omitting the federal issue in its complaint. 14B Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3D, § 3722 (1998 & Supp. 2004).

[50] *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987) (citing *Gully, supra*, at 112-13). *See also Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 474 (1998); and *Christianson, supra*, at 809, n. 3 (applying the well-pleaded complaint analysis to a 28 U.S.C. § 1338(a) question). *Christianson* also indicates that Petitioner's argument that it avoided federal jurisdiction by failing to singularly plead 26 U.S.C. § 6339(b) (despite having plead "26 U.S.C. § 6331 *et seq.*") is without merit. Putting aside for the moment that such a singular reference was not required to present a federal question (*see* Note 60, *infra*), the artful omission from the complaint of necessary federal law does not avoid federal-question jurisdiction. *Christianson, supra*, at 809, n. 3 (citing *Franchise Tax Board, supra*, at 22; and *Federated Department Stores v. Moitie*, 452 U.S. 394, 396, n. 2 (1981)) ("On the other hand, merely because a claim makes no reference to federal . . . law does not necessarily mean the claim does not 'arise under' [federal] law. Just as 'a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint,' . . . so a plaintiff may not defeat . . . jurisdiction by omitting to plead necessary federal . . . questions.").

jurisdiction by exclusive reliance on state law,"[51] what is meant by "master of the claim" is only that the plaintiff is master to decide what law his claim is based upon, not master to choose to keep the case in state court.[52] Although Petitioner's form of action in this case is a creature of state law, its substantive claim rests entirely on federal law.

2. Applying The Well-Pleaded Complaint Rule

The critical question in conducting the well-pleaded complaint rule analysis is whether, as Justice Cardozo observed in *Gully*, "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action."[53] Here, Petitioner's allegations of the various federal law questions are essential elements of its claim to invalidate the deed issued by the IRS to Respondent under the Code.[54]

[51] *Id.*

[52] *City of Chicago, supra*, at 164 (citing *Caterpillar Inc., supra*, at 398-99) ("Accordingly ICS errs in relying on the established principle that a plaintiff, as master of the complaint can 'choose to have the cause heard in state court.' . . . By raising several claims that arise under federal law, ICS subjected itself to the possibility that the City would remove the case to the federal courts.").

[53] *Gully, supra*, at 112 (citing *Starin v. New York*, 115 U.S. 248 (1885); and *First National Bank v. Williams*, 252 U.S. 504 (1920)).

[54] As Petitioner acknowledges (*See* Petitioner's Brief on the Merits, pp. 17-18), its suit was brought under Michigan's "Action to Determine Interests in Land" statute. MICH. COMP. LAWS § 600.2932. This statute is part of Michigan's Revised Judicature Act, the provisions of which are procedural, not substantive in nature. *See Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich. 146, 151, 200 N.W.2d 70, 72 (1972) ("The purpose of the [Revised Judicature Act] was to effect procedural improvements, not advance social, industrial or commercial policy in substantive areas."). The statute under which Petitioner brings its Complaint is an equitable statute, and its claim is not in the nature of an action at law for ejectment, but in equity to determine the appropriate titles, interests, and rights of the parties to real property. *See* MICH. COMP. LAWS § 600.2932(1) ("Any person, whether he is in possession of

Petitioner's complaint alleges on its face the federal question presented by this case. It states that Petitioner was "the owner in fee of certain property" and that "there is a cloud on title to said property based on a deed to Defendant Darue Eng. & Mfg, Inc."[55] Petitioner's complaint further alleges that Respondent's claimed interest in the Property "is invalid because the interest from which it claims, to-wit the Deed . . . was given with improper notice pursuant to 26 U.S.C. 6331, *et seq.*,"[56] and therefore was "null and void and void *ab initio*."[57] Importantly, Petitioner requests that "Defendant be ordered ***to have*** no right, title or interest whatever in or to the above described premises or any part thereof and that Defendant ***be enjoined*** from interfering with the use of the property by Plaintiff, its heirs, and assigns."[58] Petitioner, thus, does not merely seek to have a declaration as to what happened in the past, but a prospective judgment removing the alleged cloud of title, enjoining the exercise of rights purportedly granted in the deed from the IRS and determining that Respondent has no future or on-going right, title or interest in the Property. Petitioner has, in fact, expressly pleaded the federal question.

Moreover, pleading the infirmity of Respondent's deed – which required the express invocation of the federal statute (26 U.S.C. § 6331 *et seq.*) and introduction of the federal question – is an essential element of Petitioner's

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the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not."); and MICH. COMP. LAWS § 600.2932(5) ("Actions under this section are equitable in nature.").

[55] Complaint to Quiet Title, filed in Circuit County for the County of Eaton, State of Michigan dated December 14, 2002; Brief in Opposition to Petition for Writ of Certiorari, App. 2, ¶¶ 4 and 6.

[56] *Id.* at ¶ 10.

[57] *Id.* at ¶ 11.

[58] *Id.* at Prayer for Relief (emphasis added).

properly pleaded claim for relief.[59] It is not merely collateral or incidental to the claim, nor is it alleged in anticipation of a defense.[60] As Petitioner acknowledges, its state-law claim fell within and was required to be pleaded in accordance with the Michigan Court Rule governing a "Civil Action To Determine Interests In Land."[61] Under that Court Rule, Petitioner's complaint must allege (among other things) "the interest the defendant claims in the premises; and the facts establishing the superiority of the plaintiff's claim."[62] Thus, the Michigan law under which Petitioner brings its claim *requires* as essential elements of that claim the allegations (1) that Respondent received title from the IRS pursuant to its seizure under the Code, and (2) (to demonstrate Petitioner's allegedly superior interest) that the IRS' seizure of the property and subsequent transfer to Respondent was "null and void and void *ab initio*" because of the allegedly deficient notice under the Code.

Thus, a plain language reading of Petitioner's complaint and an examination of the pleading requirements of the applicable state law demonstrate that the federal issues were, in fact, necessarily plead by Petitioner as express and essential elements of its claim. The essential "federal question" presented by Petitioner's well-pleaded complaint,

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[59] On this point there is no dispute: "It is clear that required elements of a quiet title in Michigan included the facts that created the cloud on the title." Petitioner's Brief on the Merits, p. 18.

[60] *Id.* Petitioner's argument that 26 U.S.C. § 6339 was interjected only through Respondent's defense ignores that it is contained within the part of the Code that *Petitioner* referenced and incorporated in its complaint as the basis of its claim. Petitioner's argument further ignores that its admitted reliance upon 26 U.S.C. § 6335 to contest Respondent's claim of title from the IRS by itself presents a federal question, such that explicit reference to 26 U.S.C. § 6339 merely frames the scope and source of Respondent's acknowledged claim of title.

[61] MICH. CT. R. 3.411. *See also* Petitioner's Brief on the Merits, pp. 17-18.

[62] MICH. CT. R. 3.411(B)(2).

so understood, was whether strict compliance with the notice requirements of 26 U.S.C. § 6335 was required in order for Respondent to have good title, or whether the substantial compliance provided by 26 U.S.C. § 6339 was sufficient to secure Respondent's title. As discussed *infra,* the answer to this purely legal question is outcome determinative of Petitioner's claim, is in dispute between the parties, and implicates several substantial federal interests, and therefore, presents a substantial federal question. Under this Court's long-established standards of federal-question jurisdiction, this was enough to support removal to the District Court.

3. This Application Of The Well-Pleaded Complaint Rule Is Supported By Supreme Court Precedent

This Court's decision in *Hopkins v. Walker*[63] recognized the existence of federal-question jurisdiction on a complaint closely analogous to Petitioner's. The plaintiff in *Hopkins* brought a claim to clear its title to real property acquired by its predecessors in interest through a mining claim for which a federal patent had issued. The defendants claimed to have made lode locations on the property and recorded certificates in the county where the property was located. The plaintiff's complaint asserted that the certificates were recorded under a mistaken interpretation of federal mining law and, as a result, were invalid and clouds upon the title.[64] Original jurisdiction was founded on the fact that determination of the plaintiffs' rights required a construction of the mining laws under which the proceedings resulting in the patent were had, a decision of what, according to those laws, passed by the patent, and what, if

[63] 244 U.S. 486 (1917).

[64] *Id.* at 487-88.

anything, was excepted and remained open to location by others.[65]

Relying upon the well-pleaded complaint rule, this Court held that "where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress"[66] it "arises under" federal law. The Court rejected the argument that "the allegations concerning the existence, invalidity, and recording of the defendants' certificates of location form no part of the plaintiffs' cause of action, and so, for present purposes, must be disregarded:"[67]

> In both form and substance the bill is one to remove a particular cloud from the plaintiffs' title,--as much so as if the purpose were to have a tax deed, a lease, or a mortgage adjudged invalid and canceled. It hardly requires statement that in such cases the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action. Full recognition of this is found in the decisions of this and other courts.[68]

[65] *Id.* at 489.

[66] *Id.* (The Court also noted that "it is plain that a controversy respecting the construction and effect of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the district court.").

[67] *Id.* at 490.

[68] *Id.* (citing, *inter alia, Wilson Cypress Co. v. Del Pozo y Marcos,* 236 U. S. 635, 643 (1915); and *Lancaster v. Kathleen Oil Co.*, 241 U. S. 551, 554 (1916)).

Thus, this Court concluded, the allegations raising the issue of federal law – even though pertaining to the quality of and rights associated with the defendants' title – "are important elements of the asserted right to have the recording of the certificates canceled as a cloud upon the title."[69] Resolution of the case depended on the validity of those certificates under federal law. "We are accordingly of opinion that the bill states a case arising under the mining laws of the United States, and of which the District Court is given jurisdiction."[70]

As in *Hopkins*, Petitioner's complaint alleges that Respondent had recorded an instrument purporting to state a claim of title to the same Property to which Petitioner alleges it has title. As in *Hopkins*, the form of the action and the relief sought is in the nature of removing Respondent's alleged cloud on title and adjudging from that point forward that Respondent has no right, title, or interest in the Property. And, as in *Hopkins*, the validity of the purported cloud can be determined solely by construction and application of federal law – namely, the notice provisions of 26 U.S.C. § 6331 *et seq.*, as specifically pleaded by Petitioner. The facts showing Petitioner's title and the existence and invalidity of Respondent's deed are essential parts of the Petitioner's cause of action because Michigan's statute and applicable court rule expressly require Petitioner to plead these facts and issues.[71] Thus, construction and application of the Internal Revenue Code "are important elements of the

[69] *Id.* at 490-91.

[70] *Id.* at 491.

[71] Petitioner's argument that 26 U.S.C. § 6339 is a "federal defense" interjected by Respondent is further undercut when considered in light of the fact that 26 U.S.C. § 6339 creates and defines the nature and scope of Respondent's title which, under both the Michigan statutes governing Petitioner's form of action and *Hopkins*, Petitioner was required to "plead around" as an "essential element" of its well-pleaded complaint. *See also*, Notes 50 and 60, *supra*.

asserted right to have the [deed] canceled as a cloud upon the title."[72] Indeed, they are essential to Petitioner's cause of action.[73]

Respondent respectfully submits that *Hopkins*, if still good law, is dispositive. The question is whether subsequent developments in this Court's federal-question jurisprudence are such that if *Hopkins* were decided today, a different outcome would result. Respondent believes, as this Court asserted in 1983, that "[t]he jurisdiction structure at issue in this case has remained basically unchanged for the past century."[74] All that has followed is the continued application of that structure to a number of discreet fact situations, none of which would change the outcome of *Hopkins* or, by extension, should impact the outcome of this case. Petitioner's argument, in contrast, would compel the conclusion that the Court has already *sub silentio* overruled *Smith*, *Gully*, and a number of other more doctrinally-central cases, as well as *Hopkins*. Respondent does not believe the Court has adopted the surreptitious jurisprudence advanced by Petitioner.

[72] *Hopkins*, *supra*, at 490-91.

[73] In this respect, *Hopkins* and the present matter stand in sharp contrast to cases where the plaintiff merely sought to eject the defendant from property to which the plaintiff asserted a right or title. In those cases, the Court has consistently found no federal question presented by federal issues associated with the defendant's title because the allegations as to the defects of the defendant's title were merely anticipatory of a defense under that old form of action at law. *See, e.g., Joy v. City of St. Louis*, 201 U.S. 332 (1906); *Lancaster*, *supra*, at 554-55; and *Taylor*, *supra*, at 75 ("[H]owever essential or appropriate these allegations [that the defendants were asserting ownership under a deed that was void under the congressional legislation restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians] might have been in a bill in equity to cancel or annul the deed, they were neither essential nor appropriate in a petition in ejectment.").

[74] *Franchise Tax Board*, *supra*, at 7.

C. "Arising Under," The "Substantial" Federal Question Test And The Proper Role of *Merrell Dow*

1. The Development Of The "Arising Under" Standard Of Federal Question Jurisdiction

The "well-pleaded complaint" rule defines the object of the Court's federal-question jurisdictional analysis. As shown, Petitioner's complaint in this case necessarily invoked and incorporated the notice provisions of 26 U.S.C. § 6331 *et seq.* Petitioner, however, maintains that still its claim does not "arise under" federal law. A review of this Court's development of the "arising under" standard discloses Petitioner is wrong.

Justice Holmes' oft-quoted rule that "a suit arises under the law that creates the cause of action" was first uttered in the majority opinion he authored in *American Well Works v. Layne & Bowler Co.*,[75] wherein the defendant had interfered with the plaintiff's business by making threats to sue both the plaintiff and the plaintiff's buyers over the sale and use of plaintiff's pump, basing its threats upon allegations that the plaintiff's pump infringed on certain patents held by the defendant.[76] The plaintiff sued in state court seeking damages, alleging the defendant's claims of patent infringement were untrue.[77] The defendant removed the matter to federal court.[78] This Court determined that the plaintiff's claim was based upon the defendant's conduct, not upon the extent to which the that conduct was justified, and thus, could be stated without regard to the existence or validity of the patents claimed by the defendant.[79] The question of whether the defendant's conduct was "wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state."[80] Inasmuch as the plaintiff's claim could be fully and adequately stated without reference to federal law, it was deemed to arise under state law, leaving the federal court without jurisdiction.

The rule as articulated by Justice Holmes has been interpreted to support the rather common sense proposition that if the plaintiff's well-pleaded complaint establishes that his cause of action was created by federal law, then the Court should have jurisdiction. As was noted later in both *Franchise Tax Board* and *Merrell Dow*, however, it is better viewed as a rule of inclusion, not of exclusion;[81] and it does not address the situation where a plaintiff's cause of action is created by state law, but plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law. The Court addressed that situation five years later in *Smith v. Kansas City Title & Trust Co.*[82]

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[75] 241 U.S. 257, 260 (1916).
[76] *Id.*
[77] *Id.* at 258-59.
[78] *Id.* at 258.

[79] *Id.* at 259 (The essence of the plaintiff's complaint focused on the defendant's conduct and the effect of that conduct; thus, it was "enough to allege and prove the conduct and effect, leaving the defendant to justify if he can. . . . [b]ut all such justifications are defenses, and raise issues that are no part of the plaintiff's case."). In this respect, Justice Holmes' opinion can actually be seen as a particular application of the well-pleaded complaint rule previously discussed. The federal issue, though pleaded by the plaintiff as part of its complaint, was an anticipatory defense, not a *required* element of the actual claim.
[80] *Id.* at 260.
[81] *See Franchise Tax Board, supra*, at 8-9; *Merrell Dow, supra*, at 809, n. 5 (citing *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2nd Cir. 1964) (Friendly, J.) ("It has come to be realized that Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended.")).
[82] 255 U.S. 180 (1921).

In *Smith*, a shareholder of the defendant corporation brought a derivative action to enjoin the corporation from purchasing certain bonds which were to be issued under the authority of the Federal Farm Loan Act, which, in turn, the plaintiff shareholder challenged as unconstitutional.[83] Thus, the plaintiff was seeking a state-created remedy – an injunction – and his cause of action was properly categorized as a state cause of action; but his right to that remedy turned upon the determination of whether the Federal Farm Loan Act was constitutional.[84] In reaching its conclusion, the Court reaffirmed the well-pleaded complaint rule but noted that the focus is properly on whether the plaintiff's right to relief turns on an interpretation of federal law:

> The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.[85]

Justice Holmes' dissent in *Smith* makes clear the import and significance of the Court's decision in that case:

> This suit was brought by a citizen of Missouri against a Missouri corporation. . . . and the right claimed is that of a stockholder to prevent the directors from doing an act . . . alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. . . .

[83] *Id.* at 195-96.

[84] *Id.* at 199 ("The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the acts of Congress. . . .").

[85] *Id.*

> [T]his seems to me to make manifest . . . that, the cause of action arises wholly under Missouri law.[86]

Despite Justice Holmes' observations, the majority found there to be jurisdiction because, although the plaintiff's cause of action arose wholly under Missouri law, his right to relief turned on a construction of federal law.

While Justice Holmes found this outcome repugnant to his singular rule that "a suit arises under the law that creates the cause of action,"[87] this Court's subsequent treatment of the *American Well Works* rule as a rule of inclusion, but not of exclusion,[88] harmonized the results of *American Well Works* and *Smith* into the test which exists today. This Court's discussion in *Franchise Tax Board v. Construction Laborers Vacation Trust*[89] reflects that synthesis of the *Smith* and *American Well Works* rules. After noting that "a welter of issues regarding the interrelation of federal and state authority and proper management of the federal judicial system"[90] surrounds federal-question jurisdiction, Justice Brennan for a unanimous Court articulated the dualistic analysis of federal-question jurisdiction which reconciles *American Well Works* with *Smith*:

> The most familiar definition of the statutory "arising under" limitation is Justice Holmes' statement, "A suit arises under the law that creates the cause of action." . . . However, it is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district court's original

[86] *Id.* at 214 (Holmes, J., dissenting).

[87] *Id.* at 215 (Holmes, J., dissenting).

[88] *See* Note 81, *supra*.

[89] 463 U.S. 1 (1983)

[90] *Id.* at 8.

> jurisdiction than it is for describing which cases are beyond the district court jurisdiction. We have often held that a case "arose under" federal law where the vindication of a right under state law necessarily turned on some construction of federal law, . . . and even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle. . . . Leading commentators have suggested that for purposes of § 1331 an action "arises under" federal law "if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law."[91]

Plainly the *Franchise Tax Board* Court did not view the test announced by Justice Holmes in *American Well Works* as the only door open to federal-question jurisdiction. Rather, if "the 'law that creates the cause of action' is state law, [then] original federal jurisdiction is unavailable unless [(1)] it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or [(2)] that . . . the . . . claim is 'really' one of federal law."[92] In other words, "[e]ven though state law creates [plaintiff]'s cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."[93]

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[91] *Id.* at 8-9. (citing *American Well Works, supra*; *Smith, supra*; *Hopkins, supra*; *Flournoy v. Wiener*, 321 U.S. 253, 270-72 (1944) (Frankfurter, J., dissenting); *T.B. Harms, supra* (Friendly, J.); and P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 889 (2d ed. 1973)).

[92] *Id.* at 13.

[93] *Id.*

These dual but independent avenues of federal-question jurisdiction were confirmed – not abandoned, as Petitioner asserts – in *Merrell Dow*. The five-justice *Merrell Dow* majority expressly recognized federal-question jurisdiction in *Smith*-type cases – a telling fact as to *Merrell Dow*'s actual place in this body of jurisprudence;[94] and the continued vitality of the *Smith/Franchise Tax Board* analysis was even more strongly confirmed by the four-justice *Merrell Dow* minority.[95] Thus, whatever else may be said of *Merrell Dow,* the Court unanimously rejected any suggestion that it was over-ruling or even abandoning *sub silentio* *Smith*-type jurisdiction.

What, in fact, separates the majority and the minority in *Merrell Dow* was essentially their assessment of the importance of the concern for "practicality and necessity" in making the "arising under" determination in a case which might well have opened the federal courthouse doors to every tort action in which a state legislature or judiciary borrowed a federal standard as shorthand for establishing the duty of care. This problem – which prompted the *Merrell Dow* Court to employ Justice Cardozo's suggestion to exercise "that common-sense accommodation of judgment to kaleidoscopic situations which characterize the law in its treatment of problems of causation"[96] – led predictably to

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[94] "We have, however, also noted that a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow, supra*, at 809-10 (quoting *Franchise Tax Board, supra*, at 9) (but also noting that "[o]ur actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution. . . .").

[95] *Id.* at 820 (Brennan, J., White, J., Marshall, J., Blackmun, J., dissenting) ("The continuing vitality of *Smith* is beyond challenge. We have cited it approvingly on numerous occasions, and reaffirmed its holding several times – most recently just three Terms ago by a unanimous Court in *Franchise Tax Board*. . . .").

[96] *Id.* at 813 (quoting *Franchise Tax Board, supra*, at 20-21 (quoting *Gully, supra*, at 117-18)).

differing judgments and conclusions. Despite Petitioner's dire predictions to the contrary, no such problem is presented in this case. Here, state law is the mere vehicle through which a contested federal right is to be vindicated, while in *Merrell Dow* state law was the source of the substantive right into which a federal standard was voluntarily imported as a benchmark for one element of the cause of action. Moreover, given the rare and definable nature of the type of case presented here – one which alleges and turns upon whether the federal government violated a federal standard protecting a federally-created right to notice – such a policy concern is not implicated.

The existence of two alternative methods of acquiring federal-question jurisdiction – the federal cause of action (per *American Well Works)* and the substantial federal question within a state cause of action (per *Smith*) – was confirmed by the Court after *Merrell Dow* in *City of Chicago v. International College of Surgeons*.[97] In that case, the defendant city's administrative body repeatedly denied plaintiff's request for a permit to renovate its property on the grounds that the buildings had been designated historic landmarks.[98] The plaintiff appealed the administrative decision to the state court of general jurisdiction under the Illinois Administrative Review Law.[99] In that state-law cause of action, the plaintiff alleged that the defendant's actions violated certain constitutional protections.[100] In concluding that federal-question jurisdiction existed, this Court determined that "[i]n this case, there can be no question that ICS' state court complaints raised a number of

[97] 522 U.S. 156 (1997). It was also confirmed earlier in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 809 (1988).

[98] *Id.* at 160.

[99] *Id.*

[100] *Id.*

issues of federal law;"[101] even though it recognized that "the federal constitutional claims were raised by way of a cause of action created by state law, namely, the Illinois Administrative Review Law."[102] The Court then restated the analytical framework which is controlling in this case:

> As we have explained . . . "[e]ven though state law creates [a party's] cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law." . . . ICS' federal constitutional claims, which turn exclusively on federal law, unquestionably fit within this rule. Accordingly ICS errs in relying on the established principle that a plaintiff, as master of the complaint can "choose to have the cause heard in state court." . . . By raising several claims that arise under federal law, ICS subjected itself to the possibility that the City would remove the case to the federal courts.[103]

Thus, again and again this Court has concluded that the jurisdictional tests in *American Well Works* and *Smith* are to be understood as complementary, not contradictory. It is

[101] *Id.* at 164.

[102] *Id.*

[103] *Id.* (citing *Franchise Tax Board, supra,* at 13; *Gully, supra,* at 112; and *Caterpillar, supra,* at 398-99). The factual similarity to the instant case is striking. Just as the ICS' state court complaint was based on a state-law procedural cause of action, Petitioner's state court complaint was based on a Michigan procedural statute and remedy – a quiet title cause of action created by Michigan's Revised Judicature Act. As the Court found in *City of Chicago*, this fact alone is insufficient to deny the federal courts jurisdiction when the Petitioner's "well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law." *Id.*

under the *Smith* leg of that dual formulation of jurisdiction that the instant case is properly analyzed; but what does it mean that one's "right to relief under state law requires resolution of a substantial question of federal law"?[104] The most complete statement of the rules for making this determination is found in Justice Cardozo's majority opinion in *Gully v. First National Bank in Meridian*,[105] a case that both confirmed and explained the analytical process for determining *Smith*-type federal-question jurisdiction:

> How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . , and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .[106]

[104] *Id.*

[105] 299 U.S. 109 (1936).

[106] *Id.* at 112-13 (citing *Starin, supra*, at 257 (1885); *First National Bank, supra*, at 512 (1920); *King County v. Seattle School District*, 263 U.S. 361, 363-64 (1923); *New Orleans v. Benjamin*, 153 U.S. 411, 424 (1894); *Defiance Water Co. v. Defiance*, 191 U.S. 184, 191 (1903); *Joy, supra*; *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913); *Union & Planters' Bank, supra*; *Motley, supra*; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); and *Taylor, supra*).

* * *

> [T]here [is] a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are *basic* and those that are *collateral*, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[107]

Justice Cardozo, on behalf of the Court, thus articulated a three-part analysis to guide the exercise of federal jurisdiction in cases presented through a state-law cause of action.[108] *First,* the resolution of the question must be outcome determinative to the case such that the federal

[107] *Id.* at 118 (emphasis added).

[108] It is a condensed version of Justice Cardozo's *Gully* analysis that this Court used to describe and analyze these *Smith*-type cases in *Franchise Tax Board:* If "the 'law that creates the cause of action' is state law, [then] original federal jurisdiction is unavailable unless [(1)] it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or [(2)] that . . . the . . . claim is 'really' one of federal law." *Franchise Tax Board, supra*, at 13. In other words, "[e]ven though state law creates [plaintiff]'s cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Id.* at 13.

question must be decided in order to resolve the matter.[109] *Second,* the federal question must actually be in dispute between the parties.[110] *Third,* the federal question to be resolved must be "substantial" (i.e., must implicate a substantial federal interest).[111] The instant case satisfies each of these requirements.

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[109] *Gully*, *supra*, at 112 ("The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.").

[110] *Id.* at 113 ("A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto. . . .").

[111] *Id.* at 118 ("[T]here [is] a selective process which picks the substantial causes out of the web and lays the other ones aside."), and *Franchise Tax Board, supra,* at 13. *See also Merrell Dow, supra*, at 814, n. 12. The Court there noted that the substantiality inquiry is "really" a federal interest inquiry:

> Several commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the *nature* of the federal interest at stake.
>
> * * *
>
> Focusing on the nature of the federal interest, moreover, suggests that the widely perceived "irreconcilable" conflict between the finding of federal jurisdiction in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and the finding of no jurisdiction in *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205 (1934), . . . is far from clear. For the difference in results can be seen as manifestations of the differences in the nature of the federal issues at stake. In *Smith,* as the Court emphasized, the issue was the constitutionality of an important federal statute. * * * In *Moore,* in contrast, the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action. See 291 U.S., at 216-217. * * *

2. The Elements Of The *Gully/Franchise Tax Board* Analysis As Applied To The Instant Case

a. Resolution Of The Federal Question Is Outcome Determinative

In the present matter, resolution of the federal question is outcome determinative to Petitioner's claim. It is clear that "[t]he right or immunity [is] such that it [is] supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."[112] Petitioner's claim is that under 26 U.S.C. § 6331 *et seq*., the steps taken by the IRS to apprise Petitioner of the seizure, foreclosure, and sale of its property in satisfaction of a tax levy were insufficient to terminate its title to the property, thus rendering the consequent transfer of title to Respondent invalid, making Respondent's recorded tax deed a cloud on Petitioner's title. Petitioner's claim turns entirely upon the quality of notice required by the part of the Code incorporated by Petitioner in its complaint. If federal law requires "strict compliance" with 26 U.S.C. § 6335, Petitioner prevails; if "substantial compliance" is sufficient under 26 U.S.C. § 6339, Respondent prevails. Thus, the Petitioner's claim will be successful if 26 U.S.C. § 6331 *et seq*. is given one construction and defeated if it is given another.

b. The Federal Question Is In Dispute

The federal question is, in fact, in dispute between the parties. There is "[a] genuine and present controversy, not merely a possible or conjectural one, [which] exist[s] with reference. . . ."[113] to the federal question. The federal

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[112] *Id.* at 112.

[113] *Id.* at 113.

question is the principal matter in dispute between the parties. The legal question presented by this case (beyond the present jurisdictional question) is whether substantial compliance by the IRS under 26 U.S.C. § 6331 *et seq*. was sufficient for the divestment of title to the property from Petitioner and the vesting of that title in Respondent, or whether strict compliance with 26 U.S.C. § 6331 *et seq*. was required to accomplish the transfer.[114]

c. The Federal Question Is Substantial

Finally, and perhaps most importantly, the federal question presented in this case is "substantial" in that its resolution necessarily implicates a substantial federal interest. Although *Smith* and *City of Chicago* presented federal questions of an explicitly constitutional variety, such constitutional interests are also present in this case, albeit less directly. 26 U.S.C. § 6331 *et seq.* is manifestly designed to strike a balance between the federal government's interest in raising revenue by collecting taxes and enforcing the Code, and the taxpayer's constitutional interests in not being deprived of his property without due process and proper notice – i.e. the taxpayer's Fifth Amendment rights.[115] This

[114] Even the issue of Petitioner's unreasonable delay in bringing this action – a standard equitable defense – has been treated as implicated in the statutory interpretation, rather than preempting that interpretation. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 207 F.Supp. 694, 697-98 (W.D.Mich. 2002).

[115] U.S. CONST. amend. V. *See also Aqua Bar & Lounge, Inc. v. U.S. Dept. of Treasury Internal Revenue Service*, 539 F.2d 935, 939 (3rd Cir. 1976) (citing *Thatcher v. Powell*, 19 U.S. (6 Wheat) 119, 125 (1821); and *Reece v. Scroggins*, 506 F.2d. 967, 971 (5th Cir. 1975)) ("The inviolability of private ownership has long been a fundamental principle of our nation's jurisprudence. . . . In recognition of this principle, Congress has imposed precise strictures on the seizure and sale of an individual's property by the IRS to satisfy legitimate tax deficiencies. These provisions, which the plaintiff contends were not complied with in the instant case, are for the obvious protection of the taxpayer faced with

statutory scheme has a direct bearing on the federal government's ability to effectively enforce the tax code and raise revenue. The seizure provisions found in Subchapter D, Part II (being 26 U.S.C. § 6331 *et seq.)* do more than establish the substantive property rights of buyers at a tax sale (though they certainly do that);[116] they set forth the procedural scheme by which the federal government dispossesses delinquent taxpayers of their property in satisfaction of their tax obligations – without violation of the taxpayers' constitutional rights – and resells that property to third parties in order to raise revenue.[117] There is an obvious federal interest in ensuring the effective collection of tax revenue and in controlling the minimum value and marketability of property seized in pursuit of that interest; but at the same time there exists a substantial countervailing interest in assuring that the constitutional rights of delinquent taxpayers are not trampled.[118] Given that resolution of the federal question in this case – whether strict or substantial compliance with the notice provisions of 26 U.S.C. § 6331 *et seq*. is required in order for Respondent's title to be good as against Petitioner – will necessarily affect this balance, the federal question is substantial.

the loss of his property."). The existence of an express constitutional dispute is plainly not a precondition to *Smith*-type jurisdiction as is evident from *Hopkins* – a case virtually indistinguishable from this one – in which this Court found federal-question jurisdiction to be appropriate.

[116] 26 U.S.C. § 6339(b)(2) ("If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.").

[117] *See, generally*, 26 U.S.C. §§ 6335-6339.

[118] *See also* discussion in Section C.3.b., *infra*.

d. The Instant Case Therefore Satisfies The *Gully/Franchise Tax Board* Analysis

In sum, even though the procedural statute providing for Petitioner's cause of action is a Michigan statute,[119] the District Court nonetheless had jurisdiction under 28 U.S.C. §§ 1331 and 1441. Applying the three-factor *Gully* analysis as restated in *Franchise Tax Board,* Petitioner's "well-pleaded complaint establishes that its right to relief under state law [(1)] requires resolution [(2)] of a substantial question of federal law [(3)] in dispute between the parties."[120] Thus, jurisdiction was appropriately found.

3. The Proper Role Of *Merrell Dow*

Notwithstanding that Petitioner's well-pleaded complaint states a cause of action "arising under" federal law such that the exercise of federal jurisdiction by the District Court was appropriate under the *Smith/Gully/Franchise Tax Board/City of Chicago* analysis, Petitioner's misreading of the *Merrell Dow* decision, coupled with its improper reliance on *Beneficial National Bank v. Anderson,*[121] has led it to conclude that this Court has, with less of a bang and more of a whimper, simply done away with almost a century's worth of jurisprudence in this area. Despite this Court's express reaffirmation of the *Smith* rule in *Franchise Tax Board,*[122] *Merrell Dow,*[123] *Christianson,*[124] and *City of Chicago,*[125] Petitioner posits that the Court has abandoned altogether the *Smith* rule and adopted instead Justice Holmes' rule from *American Well Works* in which the only way for non-diverse

[119] *See* MICH. COMP. LAWS § 600.2932, and MICH. CT. R. 3.411.
[120] *Franchise Tax Board, supra,* at 13.
[121] 539 U.S. 1 (2003).
[122] 463 U.S. 1 (1983).
[123] 478 U.S. 804 (1986).
[124] 486 U.S. 800 (1988).
[125] 522 U.S. 156 (1997).

parties to access the federal courts is through a federally-created cause of action. *Merrell Dow*, however, is merely a specific application of the *Smith/ Gully/Franchise Tax Board* analysis in a context where the federal question was – to borrow Justice Cardozo's paradigm from *Gully* – "collateral" rather than "basic," and various policy concerns militated against the finding of federal jurisdiction. *Merrell Dow* did not and was not intended to establish the long elusive "single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district court."[126] Rather, it was yet another refinement of the "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system."[127]

Justice Stevens stated the question presented in *Merrell Dow* as follows: "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private right of action for violations of that federal standard, makes the action one 'arising under the Constitution, laws or treaties of the United States.'"[128] In *Merrell Dow,* the plaintiffs filed product liability suits under Ohio law in Ohio state court.[129] One of the counts of the plaintiffs' complaint alleged that the at-issue drug had been "misbranded" under the FDCA which (1) gave rise to a rebuttable presumption of negligence under Ohio law and (2) caused plaintiff's injury.[130]

The defendant removed to federal court. On appeal, the Sixth Circuit, relying on *Franchise Tax Board,* concluded federal-question jurisdiction was lacking. In affirming the holding of the Court of Appeals, this Court

[126] *Franchise Tax Board, supra* at 8.
[127] *Id.*
[128] *Merrell Dow, supra,* at 805.
[129] *Id.* at 805-06.
[130] *Id.*

noted that "[t]he 'vast majority' of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that 'a suit arises under the law that creates the cause of action.' . . . Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action."[131] The Court acknowledged – albeit with a cautionary caveat – "that a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'"[132] After noting that the case before it was precisely of this latter variety, the Court proceeded to engage in a *Gully/Franchise Tax Board* analysis of whether a "substantial" federal question was presented.[133]

> In undertaking this inquiry into whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action, it is, of course, appropriate to begin by referring to our understanding of the statute conferring federal-question jurisdiction. We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. "If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words. . . . The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." . . . In *Franchise Tax Board,* we forcefully reiterated this need for prudence and restraint in the jurisdictional inquiry: "We have always interpreted . . . 'the current of jurisdictional legislation since the Act of March 3, 1875' . . . with an eye to practicality and necessity."[134]

The Court noted that Congress had not provided any express or implied remedy for violation of the federal standard at issue.[135] The Court concluded that under such circumstances "it would . . . flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law."[136]

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[131] *Id.* at 808. This statement alone reflects the Court's recognition that *some* federal-question cases do *not* involve federally-created causes of action.

[132] *Id.* at 808-09.

[133] *Id.* at 809-10 (quoting *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting)) ("This case does not pose a federal question of the first kind; respondents do not allege that federal law creates any of the causes of action that they have asserted. This case thus poses what Justice Frankfurter called the 'litigation-provoking problem,' . . . the presence of a federal issue in a state-created cause of action.").

[134] *Id.* at 810 (quoting *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 379 (1959); and *Franchise Tax Board, supra,* at 20).

[135] The instant case is dissimilar in this respect from *Merrell Dow.* Congress, in fact, has provided an express federal remedy through which Petitioner could have sought vindication of its federal notice rights under the seizure provisions of the Code. Petitioner elected – as was its right – not to pursue that remedy; but as in *City of Chicago,* Petitioner could not thereby avoid the essential federal question inherent in its claim even as it pursued a state-law remedy.

[136] *Id.*

In rejecting the petitioner's jurisdictional argument, the Court relied heavily on "Justice Cardozo's emphasis on principled, pragmatic distinctions: 'What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside.'"[137] The absence of a congressionally-ordained private right of action to enforce the federal *standard* which Ohio law incorporated into its state-law cause of action, confirmed the already apparent lack of "substantiality" under the *Gully/Franchise Tax Board* analysis: "Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. . . ."[138]

Petitioner misapprehends what was and was not determined in *Merrell Dow*. *First*, although the Court recognized that it would be the "rare case," it expressly reaffirmed the continued viability of *Smith*-type jurisdictional cases – i.e., state-law causes of action that necessarily present disputed substantial federal questions can be removed to federal court. *Second*, the Court held that in *Smith*-type cases, the question of "substantiality" of the federal question can be established by evidence of either an explicit or implicit congressional grant of a private right of action. However, it did not (as Petitioner here claims) hold

[137] *Id.* at 813-14 (quoting *Franchise Tax Board*, *supra*, at 20-21 (quoting *Gully*, *supra*, at 117-18)). The emphasis placed on this concern in *Merrell Dow* is logical. If the case had been decided otherwise, every state-law tort action which incorporated by reference a federal standard as the state-law standard for duty or breach could be removed to federal court.

[138] *Id.* at 814.

that the absence of a federally-created private right of action *per se* defeats federal jurisdiction.[139] *Third*, the Court held that, absent a private right of action to enforce a federal standard, the mere incorporation of that standard by a state as part of its tort law does not give rise to a sufficiently substantial federal interest to warrant the exercise of federal-question jurisdiction. As will be discussed next, these three features of the *Merrell Dow* decision both harmonize it with the existing body of jurisprudence on this issue and distinguish its outcome from the instant case.

a. Federal Law Is The Substantive Basis For Petitioner's Claim

In *Merrell Dow*, the Court considered the absence of a private right of action to vindicate the federal standard in question as evidence of the absence of a *substantial* federal question. In so doing, the Court was both preserving the *Gully/Franchise Tax Board* analysis (by holding that the existence of a federally-created private right of action is evidence of substantiality), and holding that in cases where the federal question is (to borrow Justice Cardozo's characterization)[140] "collateral" rather than "basic" to the underlying dispute – as was the case in *Merrell Dow* – the absence of any federal private right of action was fatal to jurisdiction.

Both the substantive claim and the procedural cause of action in *Merrell Dow* were firmly rooted in state law. The only "contact" with federal law was the voluntary incorporation by the state of a federal regulatory *standard* as

[139] In fact, the Court plainly considered – though it ultimately rejected – the petitioner's proffered federal interest *after* concluding there was no federal private right of action. That analysis would have been wholly unnecessary if the absence of a federal right of action was the jurisdictional litmus test that Petitioner here claims.

[140] *Gully*, *supra*, at 118.

the standard of care or duty to be applied in that state-law cause of action. If *Merrell Dow* can be said to have presented any federal question, it was, at best, a "collateral" one. The question for interpretation was not one of federal law, but of state law. The case did not demand resolution of a federal law, but resolution of the state-law standard for negligence. The fact that the Ohio common law had developed a standard of care co-extensive with a federal regulatory standard did not convert that state-law standard into a federal question any more than if the Ohio legislature had instead simply incorporated the actual language of the federal statute into a state statute.[141] The fact that a state law is co-extensive or substantially the same as a federal law does not make its interpretation a federal question.[142]

Petitioner's case presents a distinctly different situation. The federal question at issue here is the substantive source of Petitioner's cause of action; its resolution is outcome determinative. Resolution of the question – whether the Code requires strict or substantial compliance with its notice provisions in order for good title to pass to tax sale purchasers – is *only* an interpretation of *federal* law. State law here has not simply adopted a federal standard as a matter of legislative choice or judicial convenience; it is constitutionally subservient to and

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[141] *See, e.g., Merrell Dow, supra,* at 814, n. 12 ("In *Moore*[, *supra*], . . . the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action."). *See also* Brief for Respondent Thompson, *Merrell Dow, supra,* at 26 (No. 85-619) ("[T]he focus is not on the implementation of the FDCA, but on whether the common law of the State of Ohio will adopt as a standard of care in a tort action provisions making the misbranding of drugs evidence of negligence *per se*.").

[142] This conclusion is buttressed by the fact that on the facts of *Merrell Dow,* the plaintiffs could have succeeded on the merits without even mentioning the FDCA standard. As noted before, the application of the "outcome determinative" standard from *Gully* leads to the conclusion reached by the Court in *Merrell Dow.*

compelled to honor the substantive federal rule by force of the Supremacy Clause.[143]

Moreover, resolution of that federal question will impact the balance Congress has struck between the respective rights and interests of the involved parties. The only federal issue in *Merrell Dow* was a federal *standard* that had been adopted and incorporated into the governing state law. Here, however, what is at issue is a federal substantive statute which, of its own force, apportions and allocates rights and liabilities amongst delinquent taxpayers, the federal government, and tax sale buyers; and it is that very apportionment and allocation, as determined by Congress, which either affirms or negates Petitioner's right to the Property. Use of the "private right of action" consideration as a rule of exclusion may make sense in a case where the federal law at issue is a federal *standard* "collateral" to the plaintiff's state cause of action; but it is better used as a rule of inclusion where the federal law at issue is a federal *substantive* statute creating and demarcating (i.e., "basic" to) the federal substantive rights which the plaintiff seeks to enforce. Consistent with the traditional *Smith*-type analysis, the instant case presents, as an essential part of Petitioner's case, a federal question which is determinative of the outcome, is actually contested, and is substantial.

b. Petitioner Misconstrues The "Private Right Of Action" Analysis

Even if *Merrell Dow* were not so distinguishable, Petitioner's interpretation of it would remain misguided. Petitioner (and *Amicus* Mikulski) appear to argue that

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[143] U.S. CONST. art. VI, cl. 2. *See also McCulloch v. Maryland,* 17 U.S. 316, 326-27 (1819); and *Kalb v. Feuerstein,* 308 U.S. 433, 439 (1940) (citing *Hines v. Lowery,* 305 U.S. 85 (1938); and *Davis v. Wechsler,* 263 U.S. 22 (1921)).

Merrell Dow holds, in effect, that if a plaintiff's cause of action is not a federally-created cause of action, federal-question jurisdiction is lacking.[144] Were that correct, this

[144] *See* Brief of *Amici Curiae* Jerome R. Mikulski *et ux.* in Support of Petitioner, p. 3 ("The Court eliminated the 'substantial federal question' doctrine as a sufficient basis for removal jurisdiction in *Beneficial National Bank*, just as it had for original jurisdiction in *Merrell Dow*, where Congress has not provided a federal private right of action for violation of the particular federal statue."). *Amicus* Mikulski builds on this misconstruction of *Merrell Dow* to posit that the Court has now altogether eliminated *Smith*-type federal-question jurisdiction in *Beneficial National Bank v. Anderson*, 503 U.S. 1 (2003). *Amicus*' interpretation of *Beneficial* ignores both its context and its language. The case concerned whether removal could be defeated by a plaintiff pleading a state claim which was wholly preempted by federal law. It is well-settled that where no state-law claim can exist, removal of what purports to be – but is not – a "state claim" is permitted. *See, e.g., Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968) (the seminal case in the LMRA context); and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (the seminal case in the ERISA context). *Beneficial* merely extends that rule to include usury claims against banks incorporated under the National Bank Act. The Court did not have occasion to consider cases (such as Petitioner's) in which a state-law procedural cause of action remains viable. If *Amicus* Mikulski reading of *Beneficial* were correct, the Court could hardly have chosen a more inscrutable and oblique method of overturning a century of federal-question jurisprudence than through a case which did not raise or consider that question and body of law. Respectfully, *Amicus* Mikulski's reading of *Beneficial* is completely undermined by the factual context and legal analysis of that case. Further, while the Court in *Beneficial* stated that a "federal *claim*" must be present for removal, it did *not* state that a "federal *cause of action*" must be present. The two concepts are not fungible. *See U.S. v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933) ("A 'cause of action' may mean one thing for one purpose and something different for another. . . . At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies. . . . This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed."). Petitioner's "cause of action" is, without question, a creature of state law, but that does not answer the question of whether its "claim" is federal. Insofar as Petitioner asserts its right to the Property

Court would hardly have needed to do more than cite Justice Holmes' opinion in *American Well Works* and announce that the jurisprudential efforts of the intervening 65 years had all been a terrible mistake. Clearly the Court's intention was more subtle than that.

Merrell Dow did not conclude that the plaintiff must have *the same* private right of action under federal law as he is pursuing under state law. It can be read, at most, as holding that the absence of *any* federal private right of action to enforce or vindicate the federal statute is evidence the federal question lacks substantiality. In *Merrell Dow,* Congress had afforded *no* private remedy whatsoever to enforce or vindicate the standard set up in the FDCA. The absence of any federal private right of action to vindicate the plaintiff's interests in that standard belied the notion that any *substantial* federal interest was implicated in the plaintiff's claim. Here, however, Congress has created a federal statutory cause of action through which a taxpayer can vindicate or enforce his notice or other due process rights established in the Code – 26 U.S.C. § 7433. The centrality of these rights to the operation of the Code and of a federal remedy to protect them is manifest. It does not matter to this analysis that this is not the remedy selected by Petitioner.[145]

exists only because it failed to receive the Notice of Seizure in the manner prescribed by federal law (26 U.S.C. § 3665) and that federal law (26 U.S.C. § 6331 *et seq.*) precludes the effective acquisition and conveyance of Petitioner's interest by the IRS without strict compliance with that federal notice standard, Petitioner's "claim" – properly so-called – can *only* be said to be "federal." *Amicus* Mikulski's careless assumption of the interchangeable use of "claim" and "cause of action" leads it to the wrong conclusion. Properly understood, *Beneficial* plays no role in resolution of this matter.

[145] Respondent understands and acknowledges Petitioner's right to select an available state-law remedy and to forego its federal remedy. *See Merrell Dow, supra*, 809, n. 6. The point is that even a state-law remedy can implicate a federal question, and *Merrell Dow* provides that at least one indicator of the substantiality of that federal question is the

The question was (and is) whether Congress has evinced an intention to preclude a federal cause of action and, therefore, to preclude the exercise of federal-question jurisdiction over matters implicating this federal notice standard. In *Merrell Dow* it had; here, it plainly has not.

The historic relationship of 28 U.S.C. §§ 1331 and 1340 provides further evidence that Congress believes that matters involving the national fisc implicate substantial federal interests which warrant a broader exercise of federal court jurisdiction than other federal questions.[146] Until 1980, when Congress removed the "amount in controversy" requirement from 28 U.S.C. § 1331, the general federal-question jurisdiction of the District Courts was limited to those cases which met the minimum jurisdictional amount.[147] However, the federal courts had jurisdiction to hear cases raising more significant federal questions under the other general jurisdiction-granting statutes regardless of the "amount in controversy" requirement.[148] In bifurcating the federal court's federal-question jurisdiction in this way, Congress was effectively excepting certain classes of federal-question cases from the "amount in controversy" requirement – including, notably, cases "arising under any Act of Congress providing for internal revenue"[149] – and was evidencing its belief that these classes of cases were of greater importance, or implicated more substantial federal interests, than federal-question cases in general, and thus, should be afforded greater access to the federal courts for resolution. The federal interests involved in this matter, resting as they do on provisions of the Code, place Petitioner's claim squarely in the category of cases that Congress has unequivocally declared to be of "substantial" federal interest, irrespective of whether the particular vehicle through which the federal question is presented is a state- or federally-based "cause of action."

The existence of both the private right of action under 26 U.S.C. § 7433 of the Code and the historical context of the express jurisdictional grant in 28 U.S.C. § 1340 are strong evidence of a congressional belief that this federal question is substantial enough to warrant federal court jurisdiction. Thus, even if *Merrell Dow* is regarded as an abandonment of the long standing *Smith/Gully/Franchise Tax Board* analytical model, as Petitioner claims, the instant case falls well within the purported *Merrell Dow* jurisdictional dividing line.

c. Proper Role Of *Merrell Dow* – *Redux*

Respondent respectfully asserts that, contrary to Petitioner's argument, this Court's decision in *Merrell Dow* did not eviscerate federal court jurisdiction where a

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existence of *some* federal private right of action to vindicate or enforce the federal right or immunity implicated in the state-law right of action. The case at bar has that indicator. The fact that Petitioner elected to forego pursuit of that federal private right of action does not deprive it of its force as a congressional expression of the substantiality of the federal interest in the resolution and protection of the underlying federal right.

[146] Respondent asks this Court to take note of the fact that, just as in analyzing whether certain cases "arise under" 28 U.S.C. § 1348, *see Christianson, supra*, the analytical framework under 28 U.S.C. § 1340 is identical to that employed under 28 U.S.C. §§ 1331 & 1441. *See, e.g., Wolkstein v. Port of New York Authority*, 178 F.Supp. 209 (D.C.N.J. 1959) (applying the identical *Gully* analysis applied herein to a case the jurisdictional basis for which was 28 U.S.C. § 1340). Therefore, Petitioner's argument regarding whether § 1340 or § 1331 provides the proper statutory basis in this case is irrelevant since the analytical framework for answering the jurisdictional question is identical.

[147] *See* Pub. L. No. 96-417, 94 Stat. 1727 (1980); and H.R. REP. NO. 96-1461 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5063.

[148] *See Zahn v. International Paper Co.*, 414 U.S. 291, 302, n. 11, (1973) ("Of course, Congress has exempted major areas of federal-question jurisdiction from any jurisdictional-amount requirements, see 28 U.S.C. §§ . . . 1336-**1340**. . . ." (emphasis added)).

[149] 28 U.S.C. § 1340 (2004).

substantial question of federal law is presented through a cause of action based on state law. Rather, *Merrell Dow* stands for the proposition that in cases (such as that one) where a federal standard at issue is merely "collateral" to the plaintiff's substantive state-law claim, the failure of Congress to provide any private right of action to vindicate or enforce that federal standard is determinative of the substantiality question when conducting a *Smith/Gully/Franchise Tax Board* analysis. In this way, *Merrell Dow* is both consistent with the body of case law that has developed on this issue over the past century, and distinguished from the instant case. The *Merrell Dow* decision in no way undermines the conclusion that, in this case, an exercise of federal jurisdiction by the District Court was appropriate.

CONCLUSION

As has been demonstrated throughout this brief, this Court's body of federal-question jurisdiction jurisprudence, when taken together as a whole, requires two interdependent analyses in order to determine whether a particular matter "arises under" federal law for purposes of exercising jurisdiction under 28 U.S.C. §§ 1331 and/or 1441: (1) "the well-pleaded complaint rule" and (2) the dual "arising under" jurisdictional analysis of *Smith/Gully/Franchise Tax Board*. Thus, the *first* question is this: Does the plaintiff's well-pleaded complaint necessarily present, as an essential element of the claim, a question of federal law? If "yes," then the *second* question is: (1) Does federal law create the plaintiff's cause of action, or (2) if state law creates the plaintiff's cause of action, is the question of federal law presented by the well-pleaded complaint (a) outcome determinative of plaintiff's claim, (b) in dispute between the parties, and (c) "substantial" such that its resolution impacts substantial federal interests? In the instant matter, the

answer to both questions is "yes," making the exercise of federal-question jurisdiction appropriate.

Petitioner expressly asserts in its complaint that its claim is based on 26 U.S.C. § 6331 *et seq*. It admits in its brief in this Court that the federal question was an essential element of its claim. The relevant Michigan law providing for the procedural vehicle employed by Petitioner required Petitioner to plead the federal question. Finally, under this Court's analysis and decision in *Hopkins*, the federal question was an essential element of its well-pleaded complaint. There is simply no question that Petitioner's well-pleaded complaint necessarily presented the following federal question on its face: Does 26 U.S.C. § 6331 *et seq.* require a federal agency (the IRS) to strictly comply with the federal notice requirements of 26 U.S.C. § 6335 in order to effectively seize and convey Petitioner's property to Respondent, or, under 26 U.S.C. § 6339, is such seizure and conveyance effective upon substantial compliance with the federal notice requirements?

There is no dispute that federal law did not, explicitly, "create" Petitioner's "cause of action." The issue then becomes whether this federal question is (1) outcome determinative of Petitioner's claim, (2) in dispute between the parties, and (3) substantial. As has been discussed, the answer to all three facets of this question is "yes." Petitioner's action comes well within this Court's long-standing and repeatedly affirmed standards of federal-question jurisdiction.

To the extent that *Merrell Dow* has application outside the realm of cases which present claims based on substantive state law incorporating federal standards by reference as "stand-ins" for the state-law standard, the "private right of action" inquiry conducted in that case goes to the third element of the *Gully/Franchise Tax Board* analysis – namely, the substantiality of the federal question.

It is difficult to fathom how the interpretation of a federal statute reflecting Congress' efforts to balance the property and due process interests of taxpayers and tax-sale purchasers and the fiscal interests of the federal government in the enforcement and operation of its revenue authority could be other than "substantial." Indeed, Congress' determination of the substantiality of the federal question in this case is manifest, both from its creation of a private right of action which Plaintiff could have brought to vindicate its federal notice rights under 26 U.S.C. § 7433 and from its historical exception (through 28 U.S.C. § 1340) of such claims from the amount in controversy requirements of 28 U.S.C. §§ 1331.

The exercise of federal-question subject matter jurisdiction under 28 U.S.C. § 1331 and 1441 by the District Court was, as the Sixth Circuit found, appropriate. The judgments of the Sixth Circuit and the District Court below should be AFFIRMED.

Respectfully submitted,

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APPENDIX: ADDITIONAL STATUTORY PROVISIONS AT ISSUE

In addition to the statutory provisions noted by the Petitioner, the following constitutional provision and federal statutes are also involved in this matter:

A. U.S. CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. U.S. CONST. amend V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

C. 26 U.S.C. § 6331 *et seq.* (2004) (Title 26; Subtitle F; Chapter 64; Subchapter D; Part II of the United States Code):

§ 6331. Levy and distraint

(a) Authority of Secretary.--If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.--The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any

case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.--Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Requirement of notice before levy.--

(1) In general.--Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 30-day requirement.--The notice required under paragraph (1) shall be—

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address,

no less than 30 days before the day of the levy.

(3) Jeopardy.--Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(4) Information included with notice.--The notice required under paragraph (1) shall include a brief statement which sets forth in simple and nontechnical terms—

(A) the provisions of this title relating to levy and sale of property,

(B) the procedures applicable to the levy and sale of property under this title,

(C) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals,

(D) the alternatives available to taxpayers which could prevent levy on the property (including installment agreements under section 6159),

(E) the provisions of this title relating to redemption of property and release of liens on property, and

(F) the procedures applicable to the redemption of property and the release of a lien on property under this title.

(e) Continuing levy on salary and wages.--The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released under section 6343.

(f) Uneconomical levy.--No levy may be made on any property if the amount of the expenses which the Secretary estimates (at the time of levy) would be incurred by the Secretary with respect to the levy and sale of such property exceeds the fair market value of such property at the time of levy.

(g) Levy on appearance date of summons.--

(1) In general.--No levy may be made on the property of any person on any day on which such person (or officer or employee of such person) is required to appear in response to a summons issued by the Secretary for the purpose of collecting any underpayment of tax.

(2) No application in case of jeopardy.--This subsection shall not apply if the Secretary finds that the collection of tax is in jeopardy.

(h) Continuing levy on certain payments.--

(1) In general.--If the Secretary approves a levy under this subsection, the effect of a levy on specified

payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released. Notwithstanding section 6334, such continuous levy shall attach to up to 15 percent of any specified payment due to the taxpayer.

(2) Specified payment.--For the purposes of paragraph (1), the term "specified payment" means—

(A) any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee,

(B) any payment described in paragraph (4), (7), (9), or (11) of section 6334(a), and

(C) any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act.

(3) Increase in levy for certain payments.--Paragraph (1) shall be applied by substituting "100 percent" for "15 percent" in the case of any specified payment due to a vendor of goods or services sold or leased to the Federal Government.

(i) No levy during pendency of proceedings for refund of divisible tax.--

(1) In general.--No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid divisible tax during the pendency of any proceeding brought by such person in a proper Federal trial court for the recovery of any portion of such divisible tax which was paid by such person if—

(A) the decision in such proceeding would be res judicata with respect to such unpaid tax; or

(B) such person would be collaterally estopped from contesting such unpaid tax by reason of such proceeding.

(2) Divisible tax.--For purposes of paragraph (1), the term "divisible tax" means—

(A) any tax imposed by subtitle C; and

(B) the penalty imposed by section 6672 with respect to any such tax.

(3) Exceptions.—

(A) Certain unpaid taxes.-- This subsection shall not apply with respect to any unpaid tax if—

(i) the taxpayer files a written notice with the Secretary which waives the restriction imposed by this subsection on levy with respect to such tax; or

(ii) the Secretary finds that the collection of such tax is in jeopardy.

(B) Certain levies.--This subsection shall not apply to—

(i) any levy to carry out an offset under section 6402; and

(ii) any levy which was first made before the date that the applicable proceeding under this subsection commenced.

(4) Limitation on collection activity; authority to enjoin collection.—

(A) Limitation on collection.--No proceeding in court for the collection of any unpaid tax to which paragraph (1) applies shall be begun by the Secretary during the pendency of a proceeding under such paragraph. This subparagraph shall not apply to—

(i) any counterclaim in a proceeding under such paragraph; or

(ii) any proceeding relating to a proceeding under such paragraph.

(B) Authority to enjoin.--Notwithstanding section 7421(a), a levy or collection proceeding prohibited by this subsection may be enjoined (during the period such prohibition is in force) by the court in which the proceeding under paragraph (1) is brought.

(5) Suspension of statute of limitations on collection.--The period of limitations under section 6502 shall be suspended for the period during which the Secretary is prohibited under this subsection from making a levy.

(6) Pendency of proceeding.--For purposes of this subsection, a proceeding is pending beginning on the date such proceeding commences and ending on the date that a final order or judgment from which an appeal may be taken is entered in such proceeding.

(j) No levy before investigation of status of property.—

(1) In general.--For purposes of applying the provisions of this subchapter, no levy may be made on any property or right to property which

is to be sold under section 6335 until a thorough investigation of the status of such property has been completed.

(2) Elements in investigation.--For purposes of paragraph (1), an investigation of the status of any property shall include--

(A) a verification of the taxpayer's liability;

(B) the completion of an analysis under subsection (f);

(C) the determination that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to such liability; and

(D) a thorough consideration of alternative collection methods.

(k) No levy while certain offers pending or installment agreement pending or in effect.--

(1) Offer-in-compromise pending.-- No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax—

(A) during the period that an offer-in-compromise by such person under section 7122 of such unpaid tax is pending with the Secretary; and

(B) if such offer is rejected by the Secretary, during the 30

days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending).

For purposes of subparagraph (A), an offer is pending beginning on the date the Secretary accepts such offer for processing.

(2) Installment agreements.--No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax—

(A) during the period that an offer by such person for an installment agreement under section 6159 for payment of such unpaid tax is pending with the Secretary;

(B) if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending);

(C) during the period that such an installment agreement for payment of such unpaid tax is in effect; and

(D) if such agreement is terminated by the Secretary, during the 30 days thereafter (and, if an appeal of such

termination is filed within such 30 days, during the period that such appeal is pending).

(3) Certain rules to apply.--Rules similar to the rules of—

(A) paragraphs (3) and (4) of subsection (i), and

(B) except in the case of paragraph (2)(C), paragraph (5) of subsection (i),

shall apply for purposes of this subsection.

(l) Cross references.--

(1) For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

(3) For release and notice of release of levy, see section 6343.

§ 6332. Surrender of property subject to levy

(a) Requirement.--Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special rule for life insurance and endowment contracts.--

(1) In general.--A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy.--Such levy shall be deemed to be satisfied if such organization pays over to the Secretary the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to

which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings.--The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) Special rule for banks.--Any bank (as defined in section 408(n)) shall surrender (subject to an attachment or execution under judicial process) any deposits (including interest thereon) in such bank only after 21 days after service of levy.

(d) Enforcement of levy.--

(1) Extent of personal liability.--Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the underpayment rate established under section 6621 from the date of such levy (or, in the case of a levy described in

section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) Penalty for violation.--In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(e) Effect of honoring levy.--Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

(f) Person defined.--The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

§ 6333. Production of books

If a levy has been made or is about to be made on any property, or right to property, any person having custody or control of any books or records, containing evidence or statements relating to the property or right to property subject to levy, shall, upon demand of the Secretary, exhibit such books or records to the Secretary.

§ 6334. Property exempt from levy

(a) Enumeration.--There shall be exempt from levy--

(1) Wearing apparel and school books.--Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, provisions, furniture, and personal effects.--So much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $6,250 in value;

(3) Books and tools of a trade, business, or profession.--So many of

the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $3,125 in value;

(4) Unemployment benefits.--Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered mail.--Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain annuity and pension payments.--Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 1562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's compensation.--Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of

Columbia, or the Commonwealth of Puerto Rico.

(8) Judgments for support of minor children.--If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) Minimum exemption for wages, salary, and other income.--Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

(10) Certain service-connected disability payments.--Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code) disability benefit under—

(A) subchapter II, III, IV, V, or VI of chapter 11 of such title 38, or

(B) chapter 13, 21, 23, 31, 32, 34, 35, 37, or 39 of such title 38.

(11) Certain public assistance payments.--Any amount payable to an individual as a recipient of public assistance under—

(A) title IV or title XVI (relating to supplemental security income for the aged, blind, and disabled) of the Social Security Act, or

(B) State or local government public assistance or public welfare programs for which eligibility is determined by a needs or income test.

(12) Assistance under Job Training Partnership Act.--Any amount payable to a participant under the Job Training Partnership Act (29 U.S.C. 1501 et seq.) from funds appropriated pursuant to such Act.

(13) Residences exempt in small deficiency cases and principal residences and certain business assets exempt in absence of certain approval or jeopardy.—

(A) Residences in small deficiency cases.--If the amount of the levy does not exceed $5,000--

(i) any real property used as a residence by the taxpayer; or

(ii) any real property of the taxpayer (other than real property which is rented) used by any other individual as a residence.

(B) Principal residences and certain business assets.--**Except to the extent provided in subsection (e)—**

(i) the principal residence of the taxpayer (within the meaning of section 121); and

(ii) tangible personal property or real property (other than real property which is rented) used in the trade or business of an individual taxpayer.

(b) Appraisal.--The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary shall summon three disinterested individuals who shall make the valuation.

(c) No other property exempt.--Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property

shall be exempt from levy other than the property specifically made exempt by subsection (a).

(d) Exempt amount of wages, salary, or other income.--

(1) Individuals on weekly basis.--In the case of an individual who is paid or receives all of his wages, salary, and other income on a weekly basis, the amount of the wages, salary, and other income payable to or received by him during any week which is exempt from levy under subsection (a)(9) shall be the exempt amount.

(2) Exempt amount.--For purposes of paragraph (1), the term "exempt amount" means an amount equal to—

(A) the sum of—

(i) the standard deduction, and

(ii) the aggregate amount of the deductions for personal exemptions allowed the taxpayer under section 151 in the taxable year in which such levy occurs, divided by

(B) 52.

Unless the taxpayer submits to the Secretary a written and properly verified statement specifying the facts necessary to determine the proper

amount under subparagraph (A), subparagraph (A) shall be applied as if the taxpayer were a married individual filing a separate return with only 1 personal exemption.

(3) Individuals on basis other than weekly.--In the case of any individual not described in paragraph (1), the amount of the wages, salary, and other income payable to or received by him during any applicable pay period or other fiscal period (as determined under regulations prescribed by the Secretary) which is exempt from levy under subsection (a)(9) shall be an amount (determined under such regulations) which as nearly as possible will result in the same total exemption from levy for such individual over a period of time as he would have under paragraph (1) if (during such period of time) he were paid or received such wages, salary, and other income on a regular weekly basis.

(e) Levy allowed on principal residences and certain business assets in certain circumstances.--

(1) Principal residences.—

(A) Approval required.--A principal residence shall not be exempt from levy if a judge or magistrate of a district court of the United States approves (in writing) the levy of such residence.

(B) Jurisdiction.--The district courts of the United States shall have exclusive jurisdiction to approve a levy under subparagraph (A).

(2) Certain business assets.--Property (other than a principal residence) described in subsection (a)(13)(B) shall not be exempt from levy if—

(A) a district director or assistant district director of the Internal Revenue Service personally approves (in writing) the levy of such property; or

(B) the Secretary finds that the collection of tax is in jeopardy.

An official may not approve a levy under subparagraph (A) unless the official determines that the taxpayer's other assets subject to collection are insufficient to pay the amount due, together with expenses of the proceedings.

(f) Levy allowed on certain specified payments.--Any payment described in subparagraph (B) or (C) of section 6331(h)(2) shall not be exempt from levy if the Secretary approves the levy thereon under section 6331(h).

(g) Inflation adjustment.--

(1) In general.--In the case of any calendar year beginning after 1999, each dollar amount referred to in

paragraphs (2) and (3) of subsection (a) shall be increased by an amount equal to—

(A) such dollar amount, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year, by substituting "calendar year 1998" for "calendar year 1992" in subparagraph (B) thereof.

(2) Rounding.--If any dollar amount after being increased under paragraph (1) is not a multiple of $10, such dollar amount shall be rounded to the nearest multiple of $10.

§ 6335. Sale of seized property

(a) Notice of seizure.--As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.--The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) Sale of indivisible property.--If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Time and place of sale.--The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

(e) Manner and conditions of sale.--

(1) In general.--

(A) Determinations relating to minimum price.--Before the sale of property seized by levy, the Secretary shall determine--

(i) a minimum price below which such property shall not be sold (taking into account the expense of making the levy and conducting the sale), and

(ii) whether, on the basis of criteria prescribed by the Secretary, the purchase of such property by the United States at such minimum price would be in the best interest of the United States.

(B) Sale to highest bidder at or above minimum price.--If, at the sale, one or more persons offer to purchase such property for not less than the amount of the minimum price, the property shall be declared sold to the highest bidder.

(C) Property deemed sold to United States at minimum price in certain cases.-- If no person offers the amount of the

minimum price for such property at the sale and the Secretary has determined that the purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States at such minimum price.

(D) Release to owner in other cases.--If, at the sale, the property is not declared sold under subparagraph (B) or (C), the property shall be released to the owner thereof and the expense of the levy and sale shall be added to the amount of tax for the collection of which the levy was made. Any property released under this subparagraph shall remain subject to any lien imposed by subchapter C.

(2) Additional rules applicable to sale.--The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternatives applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than—

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed

in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) Payment of amount bid.--If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary, the sale may be declared by the Secretary to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall receive such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever,

and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(4) Cross reference.--For provision providing for civil damages for violation of paragraph (1)(A)(i), see section 7433.

(f) Right to request sale of seized property within 60 days.--The owner of any property seized by levy may request that the Secretary sell such property within 60 days after such request (or within such longer period as may be specified by the owner). The Secretary shall comply with such request unless the Secretary determines (and notifies the owner within such period) that such compliance would not be in the best interests of the United States.

(g) Stay of sale of seized property pending tax court decision.--For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

§ 6336. Sale of perishable goods

If the Secretary determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense, he shall appraise the value of such property and--

(1) Return to owner.--If the owner of the property can be readily found, the Secretary shall give him notice of such determination of the appraised value of the property. The property shall be returned to the owner if, within such

time as may be specified in the notice, the owner—

(A) Pays to the Secretary an amount equal to the appraised value, or

(B) Gives bond in such form, with such sureties, and in such amount as the Secretary shall prescribe, to pay the appraised amount at such time as the Secretary determines to be appropriate in the circumstances.

(2) Immediate sale.--If the owner does not pay such amount or furnish such bond in accordance with this section, the Secretary shall as soon as practicable make public sale of the property in accordance with such regulations as may be prescribed by the Secretary.

§ 6337. Redemption of property

(a) Before sale.--Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) Redemption of real estate after sale.--

(1) Period.--The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.

(2) Price.--Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) Record.--When any lands sold are redeemed as provided in this section, the Secretary shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

§ 6338. Certificate of sale; deed of real property

(a) Certificate of sale.--In the case of property sold as provided in section 6335, the Secretary shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In

the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) Deed to real property.--In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

(c) Real property purchased by United States.--If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary shall at the proper time execute a deed therefor, and without delay cause such deed to be duly recorded in the proper registry of deeds.

§ 6339. Legal effect of certificate of sale of personal property and deed of real property

(a) Certificate of sale of property other than real property.--In all cases of sale pursuant to section 6335 of property (other than real property), the certificate of such sale--

(1) As evidence.--Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and

(2) As conveyances.--Shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold; and

(3) As authority for transfer of corporate stock.--If such property consists of stocks, shall be notice, when received, to any corporation, company, or association of such transfer, and shall be authority to such corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and

(4) As receipts.--If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of such securities or other evidences of debt; and

(5) As authority for transfer of title to motor vehicle.--If such property consists of a motor vehicle, shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on his books and records in the same manner as if the certificate of title to such motor vehicle were transferred or assigned by the

party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(b) Deed of real property.--In the case of the sale of real property pursuant to section 6335--

(1) Deed as evidence.--The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title.--If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

(c) Effect of junior encumbrances.--A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority.

(d) Cross references.--

(1) For distribution of surplus proceeds, see section 6342(b).

(2) For judicial procedure with respect to surplus proceeds, see section 7426(a)(2).

§ 6340. Records of sale

(a) Requirement.--The Secretary shall, for each internal revenue district, keep a record of all sales of property under section 6335 and of redemptions of such property. The record shall set forth the tax for which any such sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making such sale, the amount of expenses, the names of the purchasers, and the date of the deed or certificate of sale of personal property.

(b) Copy as evidence.--A copy of such record, or any part thereof, certified by the Secretary shall be evidence in any court of the truth of the facts therein stated.

(c) Accounting to taxpayer.--The taxpayer with respect to whose liability the sale was conducted or who redeemed the property shall be furnished—

(1) the record under subsection (a) (other than the names of the purchasers);

(2) the amount from such sale applied to the taxpayer's liability; and

(3) the remaining balance of such liability.

§ 6341. Expense of levy and sale

The Secretary shall determine the expenses to be allowed in all cases of levy and sale.

§ 6342. Application of proceeds of levy

(a) Collection of liability.--Any money realized by proceedings under this subchapter

(whether by seizure, by surrender under section 6332 (except pursuant to subsection (c)(2) thereof), or by sale of seized property) or by sale of property redeemed by the United States (if the interest of the United States in such property was a lien arising under the provisions of this title) shall be applied as follows:

(1) Expense of levy and sale.--First, against the expenses of the proceedings;

(2) Specific tax liability on seized property.--If the property seized and sold is subject to a tax imposed by any internal revenue law which has not been paid, the amount remaining after applying paragraph (1) shall then be applied against such tax liability (and, if such tax was not previously assessed, it shall then be assessed);

(3) Liability of delinquent taxpayer.--The amount, if any, remaining after applying paragraphs (1) and (2) shall then be applied against the liability in respect of which the levy was made or the sale was conducted.

(b) Surplus proceeds.--Any surplus proceeds remaining after the application of subsection (a) shall, upon application and satisfactory proof in support thereof, be credited or refunded by the Secretary to the person or persons legally entitled thereto.

§ 6343. Authority to release levy and return property

(a) Release of levy and notice of release.--

(1) In general.--Under regulations prescribed by the Secretary, the Secretary shall release the levy upon all, or part of, the property or rights to property levied upon and shall promptly notify the person upon whom such levy was made (if any) that such levy has been released if--

(A) the liability for which such levy was made is satisfied or becomes unenforceable by reason of lapse of time,

(B) release of such levy will facilitate the collection of such liability,

(C) the taxpayer has entered into an agreement under section 6159 to satisfy such liability by means of installment payments, unless such agreement provides otherwise,

(D) the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer, or

(E) the fair market value of the property exceeds such liability and release of the levy on a part of such property could be made

without hindering the collection of such liability.

For purposes of subparagraph (C), the Secretary is not required to release such levy if such release would jeopardize the secured creditor status of the Secretary.

(2) Expedited determination on certain business property.--In the case of any tangible personal property essential in carrying on the trade or business of the taxpayer, the Secretary shall provide for an expedited determination under paragraph (1) if levy on such tangible personal property would prevent the taxpayer from carrying on such trade or business.

(3) Subsequent levy.--The release of levy on any property under paragraph (1) shall not prevent any subsequent levy on such property.

(b) Return of property.--If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return--

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from the sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(c) Interest.--Interest shall be allowed and paid at the overpayment rate established under section 6621--

(1) in a case described in subsection (b)(2), from the date the Secretary receives the money to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days, or

(2) in a case described in subsection (b)(3), from the date of the sale of the property to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days.

(d) Return of property in certain cases.--If--

(1) any property has been levied upon, and

(2) the Secretary determines that--

(A) the levy on such property was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the levy was imposed by means of installment payments, unless such agreement provides otherwise,

(C) the return of such property will facilitate the collection of the tax liability, or

(D) with the consent of the taxpayer or the National Taxpayer Advocate, the return of such property would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States, the provisions of subsection (b) shall apply in the same manner as if such property had been wrongly levied upon, except that no interest shall be allowed under subsection (c).

(e) Release of levy upon agreement that amount is not collectible.--In the case of a levy on the salary or wages payable to or received by the taxpayer, upon agreement with the taxpayer that the tax is not collectible, the Secretary shall release such levy as soon as practicable.

§ 6344. Cross references

(a) Length of period.--For period within which levy may be begun in case of—

(1) Income, estate, and gift taxes, and taxes imposed by chapter 41, 42, 43, or 44, see sections 6502(a) and 6503(a)(1).

(2) Employment and miscellaneous excise taxes, see section 6502(a).

(b) Delinquent collection officers.--For distraint proceedings against delinquent internal revenue officers, see section 7804(c).

(c) Other references.--For provisions relating to--

(1) Stamps, marks and brands, see section 6807.

(2) Administration of real estate acquired by the United States, see section 7506.

D. 26 U.S.C. § 7433 (2004):

(a) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the

exclusive remedy for recovering damages resulting from such actions.

(b) Damages.--In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of--

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority.--Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations.--

(1) Requirement that administrative remedies be exhausted.--A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages.--The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which

could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures.--

(1) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive.—

(A) In general.--Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted.--Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that—

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.